

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**RESPONDENT'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE ON BEST EVIDENCE GROUNDS
AND SUPPORTING MEMORANDUM OF LAW**

The Honorable Gregory P. Holder (“Judge Holder” or “Respondent”), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission (“the Panel”) this Motion in Limine to Exclude Evidence on Best Evidence Grounds and Supporting Memorandum of Law (“Motion”).

In July 2003, the Florida Judicial Qualifications Commission (the “JQC”) filed a Notice of Formal Charges (the “Charges”) instituting this proceeding to determine whether Judge Holder plagiarized a 1998 paper submitted to the Air War College (“AWC”) and made a false statement when he certified that it was his work. The papers upon which the JQC relies to support its allegations are a copy of an AWC paper submitted by E. David Hoard in 1996 (the “Hoard paper”) *See* Exhibit 1, and two alleged copies of a paper that contains material from the Hoard paper and allegedly was submitted to the AWC by Respondent in 1998 (“purported Holder paper”) *See* Exhibit 2 & 3. (*See also* Exhibit “A” to the Charges.) This Motion seeks to exclude from evidence the copies of the purported Holder paper.

I. BACKGROUND.

The factual background concerning the purported Holder paper has been set forth in Respondent's Motion in Limine to Exclude Evidence on Due Process Grounds and Supporting Memorandum of Law ("Due Process Mot.") and is incorporated by this reference.

II. THE BEST EVIDENCE RULE PRECLUDES ADMISSION OF THE PURPORTED HOLDER PAPER.

In order to prevail, the JQC must prove, by clear and convincing evidence, that Respondent committed plagiarism when he prepared and submitted his paper to the AWC. Thus, the contents of Respondent's AWC paper is an essential element of the JQC's case. Despite the paper's significance, however, the JQC has been unable to produce the original of the paper that it contends Respondent submitted to the AWC in 1998. Instead, the JQC has only produced a copy of the purported Holder paper. That copy, however, is inadmissible for failure to comply with Florida's best evidence rule. Indeed, the admission of copies of the purported Holder paper risks the very type of fraud that the best evidence rule is intended to prevent.

Florida's best evidence rule "requires that when the contents of a writing ... are being proved, an original must be offered unless a statutory excuse

for the lack of an original exists.” C. Ehrhardt, Fla. Evid. § 952.1 (2004).¹

Specifically, the Florida Evidence Code provides that

Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording or photograph.

§ 90.952, Fla. Stat. The requirement of an “original” ensures that the evidence presented is an accurate transmittal of the critical facts contained within it. *See McKeehan v. State*, 838 So. 2d 1257, 1260 (Fla. 5th DCA 2003). In short, the “original writing is required because oral testimony may be inaccurate [or] fraud may result.” C. Ehrhardt, Fla. Evid. § 952.1. *See also U.S. v. Howard*, 953 F.2d 610, 613 (11th Cir. 1992).

The Evidence Code, however, does permit the introduction of duplicates under certain circumstances:

A duplicate is admissible to the same extent as an original, unless:

....

(2) A genuine question is raised about the authenticity of the original or any other document or writing.

(3) It is unfair, under the circumstance, to admit the duplicate in lieu of the original.

§ 90.953, Fla. Stat. Thus, for the copies of the purported Holder paper to be admissible, (a) the copies must be “duplicates,” (b) no genuine question can exist

¹ This proceeding is governed by the Florida Rules of Evidence which provides that the Florida Evidence Code applies to all civil proceedings and “all other proceedings.” Fla. Stat. § 90.103. *See also* Resp.’s Mot. in Limine to Exclude Evid. on Authentication Grounds & Supporting Mem. of Law at 2.

regarding authenticity; and (b) it must be fair to admit the paper in lieu of the original. None of these three tests are satisfied in this case.

A. The Alleged Copies Have Not Been Shown to be Duplicates.

Resort to the duplicate exception to the best evidence rule is inappropriate because there is absolutely no evidence that the alleged copies of the purported Holder paper are duplicates of an authentic original purported Holder paper. The Evidence Code defines duplicate to include:

A counterpart produced by the same impression as the original, from the same matrix; by means of photography, including enlargements and miniatures; by mechanical or electronic recording; by chemical reproduction; or by other equivalent technique that accurately reproduces the original.

§ 90.951, Fla. Stat. The key point is that the proponent must establish that the proffered document is an accurate reproduction of the original.

When there is insufficient proof to establish that the photocopy is the same as the original, the evidence must be excluded. In *Hutchinson v. State*, the defendant was convicted for the sale and delivery of cocaine. 580 So. 2d 257, 262 (Fla. 1st DCA 1991). On appeal, the defendant contended that the trial court had violated the best evidence rule when it admitted a photocopy of the money allegedly used in drug sale. The photocopy was a reproduction on a single sheet of paper showing one side of four twenty dollar bills and two five dollar bills. *Id.* The state presented evidence that the original bills were photocopied before being used

to buy drugs from the defendant. *Id.* After the bills had been photocopied, other markings were put on the original bills so that the officers could identify the money after it was used in the sale. *Id.*

At trial, not a single officer could recall the markings on the original bills or the serial numbers on the bills:

[T]he undercover officer who allegedly recovered the money after [defendant] had dropped it to the groun[d] could not recall the markings that were made on the money that evening which enabled him to identify it as the same he had delivered to [defendant].

Id. at 262-63. Thus, although the “serial numbers of the bills were circled on the exhibit, these circles were not the markings used by the arresting officer to identify the money recovered from Hutchinson when he was apprehended.” *Id.* at 263.

Accordingly, the court held:

This proof was not sufficient to establish that the photocopy of the money offered in evidence was the *same money* given to [defendant] during the alleged transaction. The officers’ testimony clearly indicated that the money was marked *after* it was photocopied and that neither officer could recall the markings that were made on the money given to [defendant].

Id.

Similarly, in this case, the JQC has no evidence that the alleged copies of the purported Holder paper are duplicates of an authentic original purported Holder paper. The JQC has no witness who can testify that documents Exhibits 2 & 3 are accurate reproductions of an authentic original. Indeed, earlier generation

duplicates of the documents at issue were allegedly submitted by an anonymous informant. *See* Due Process Mot. Without sufficient evidence demonstrating that the copies of the purported Holder paper is an accurate and genuine reproduction of the original, the JQC simply cannot meet the necessary foundation for the admissibility of the purported Holder paper as a duplicate.² Accordingly, the alleged copies of the purported Holder paper must be excluded.

B. There Is a Genuine Question Regarding Authenticity.

Even if the JQC could establish a proper foundation, a duplicate may not be admitted into evidence if there is “genuine question is raised about the authenticity of the original or any other document or writing.” § 90.953(2), Fla. Stat. As a leading treatise on Florida evidence explains,

If there is a genuine question concerning the authenticity of the duplicate, the duplicate is not admissible under section 90.953(2). For example, if a defendant alleges that he did not sign a contract upon which the plaintiff sued, but rather signed a different contract, a genuine question is “raised about the authenticity of the original” and the duplicate is not admissible under section 90.953(2). The original must be offered unless an adequate excuse for its non-production is demonstrated under section 90.954.”

C. Ehrhardt, Fla. Evid. § 953.1 (2004).

² In addition, for all the reasons set forth in Respondent’s Motion in Limine to Exclude Copies of the Purported Holder Paper on Authentication Grounds and Supporting Memorandum of Law, the original of the purported Holder paper itself can not be established as authentic. This alone provides yet another reason to exclude the alleged copies.

For all the reasons set forth in Respondent’s Motion in Limine to Exclude Copies of the Purported Holder Paper on Authentication Grounds and Supporting Memorandum of Law, there is—at the very least—a genuine question regarding the authenticity of the purported Holder paper. Therefore, the best evidence rule prohibits the admission of copies.

In fact, courts have excluded evidence under the best evidence rule in less compelling circumstances than those of this case. For example, in *United States v. Haddock*, the court upheld the exclusion of photocopies of six documents supporting his defense. However, only he “could recall ever seeing either the original or a copy of these documents.” 956 F.2d 1534, 1545 (10th Cir. 1992), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506, 132 L. Ed. 2d 444 (1995). “[N]o one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the content of the photocopies.” *See Id.* at 1545-46. Moreover, several witnesses testified that markings and statements on the photocopies did not comport with similar documents prepared in the ordinary course of business. *See Id.* at 1546.

Likewise, in this case the JQC is relying upon a photocopy of a document that no witness can identify as being the submitted by Respondent or received by the AWC. The individual who typed the AWC paper, as well as those

who reviewed Respondent's AWC paper after it was submitted immediately after the paper's submission, have sworn that the purported Holder paper is not Judge Holder's AWC paper. *See* Due Process Mot. Additionally, the purported Holder paper fails to contain the standard AWC markings. *See Id.*

Additionally, in *Porras v. Porras*, the court excluded a photocopy of a letter that was provided to support the debtor's position. The court explained:

[T]his letter suddenly appears with no explanation as to why it has not appeared previously and no explanation as to why the original is not produced. This court finds that no grounds have been advanced to admit the duplicate letter from [the debtor] as evidence in this proceeding and therefore no credible fact issue is raised to refute the clear evidence that the trust was earlier, and properly revoked.

224 B.R. 367, 371 (Bankr. W.D. Tex. 1998). The court recognized that the debtor had the necessary motive to fabricate the "letter" to serve his own self-interest.

Similarly, in this case, the copy of the purported Holder paper appeared contemporaneously with Respondent's cooperation with investigations into public misconduct and corruption. During that time, individuals had the necessary motive to seek retribution against Judge Holder and submit a fraudulent document purporting to be authored by him. Because there is a genuine question regarding the authenticity of the purported Holder paper, the best evidence requires the exclusion of the proffered copies.

C. Admission Would Be Unfair Under the Circumstances.

The alleged copies of the purported Holder paper also are inadmissible because it would be “unfair, under the circumstance, to admit the document in lieu of the original.” § 90.953(2), Fla. Stat. As the JQC itself has admitted, it has no witness who can testify based upon personal knowledge that the copies of the purported Holder paper “could not have been fabricated through the use of existing computer and/or other technology or techniques.” Resp. to Resp.’s 1st Req. for Admissions ¶ 16. In short, there is no way to prove that this document is either authentic or a fabrication based upon a photocopy. Given that the charges in this proceeding turning entirely on the authenticity of the underlying document, it would be unfair under the circumstances to permit the admission of alleged copies.

Moreover, admission of the alleged copies is also unfair because the possessors of those copies appear unable to testify fully as to the events surrounding their possession of the copies. *See* Resp.’s Mot. in Limine to Exclude Testimony of Jeffrey Del Fuoco & Supporting Mem. of Law; Resp.’s Mot. in Limine to Exclude Testimony of Jeffrey Downing & Supporting Mem. of Law. In fact, the inability to question this witnesses is particularly problematic because credibility is at issue. *See Fox v. Peck Iron & Metal Co., Inc.*, 25 B.R. 674 (Bankr. S.D. Cal. 1982) (excluding suspect document where court in non-jury trial found

that witness was not credible and document could not be tied to any one author). Here, the evidence demonstrating a substantial possibility of fraud coupled with the inability to effectively question key witnesses makes it unfair to admit alleged copies in lieu of the original.³

If the Panel desires oral argument on this motion, Respondent respectfully requests that it be set as soon as can be scheduled by the Panel.

³ Section 90.954 of the Florida Statutes also provides for the admissibility of “other evidence” under narrow circumstances. The other evidence exception, however, does not apply in this case. The other evidence statute provides that if the other evidence criteria are met, the “original of a writing ... is not required, *except as provided in s. 90.953.*” Fla. Stat. § 90.954 (emphasis added). Section 90.953 in turn requires the exclusion of non-original documents where “a genuine question is raised about the authenticity of the original” or it “is unfair ... to admit the duplicate.” *Id.* § 90.953(1), (2). For the reasons set forth in Sections II.B and II.C, these exclusions apply and thus preclude the applicability of the other evidence exception. In any event, the other evidence exception applies where “[a]ll originals are lost or destroyed.” *Id.* § 90.954(1). The proponent of the evidence has the burden to adduce strict proof that all originals have been lost or destroyed. *See Sylvania Electric Products, Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965). The JQC has not met that burden.

Dated: August 25, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing Respondent's Motion to Dismiss has been served by facsimile to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; and by telecopier and U.S. Mail to: Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.

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